75-5983

IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1975

NO. 75-5983

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SUPREME COURT, U.S.

CHARLES D. THOMPSON

Petitioner,

-V-

THE STATE OF NORTH CAROLINA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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NO. ____

CHARLES D. THOMPSON,

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THE STATE OF NORTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
COURT OF NORTH CAROLINA

The above named petitioner respectfully prays that a Writ of Certiorari issue to review the opinion of the Supreme Court of North Carolina entered in this cause on June 6, 1975 affirming the judgement of the Superior Court of Mecklenburg County, North Carolina.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at _____ N.C. _____, 214 SE2d 742, and is set out in the Appendix of this petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3). The judgement and opinion of the Supreme Court of North Carolina, affirming petitioners conviction was entered on the 6th day of June, 1975.

QUESTIONS PRESENTED

1. Was the inculpatory and self incriminating statements made by the petitioner to Sheriff Blane Yelton, of Rutherford County, which was the basis of his conviction in the trial Court, free and voluntary statements as required by the Fourteenth Amendment to the Constitution of the United States?

2. Whether the petitioner during his interrogation by Sheriff Blane Yelton of Rutherford County, as a kidnapping and murder suspect was "denied the assistance of counsel" in violation of his rights under the Sixth Amendment to the Constitution of the United States as "made obligatory upon the States" by the Fourteenth Amendment, thereby rendering inadmissible in this State criminal trial any incriminating statements elicited by the Sheriff during the interregation?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 14th Amendment to the United States Constitution, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. 5th Amendment to the United States Constitution:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. N. C. General Statutes 14-17, Vol. 1B, Page 416:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premediated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishments shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

4. N. C. General Statutes 15-46, Vol. 1C, Page 22:

> "Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

STATEMENT OF FACTS

On Voir Dire, R.p._____ to _____ to determine whether a confession by the petitioner of the murder of Van Gruder Watson, to Sheriff Blane Yelton, Sheriff of Rutherford County was given voluntarily, petitioner contends that the following facts tend to show that the same was given involuntarily and hence its admission in evidence over his objection denied to him rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States:

(1) The defendant was a young man, age 19, with the limited education having an I.Q. of only 55.

(2) He was arrested without a warrant, and while the Sheriff professed to have acted upon the authority of the parole officer in revoking the defendant's parole, the alleged authority was never produced though demanded by defense counsel (R p __). No warrant was issued against the defendant for over twenty-four hours.

(3) The defendant was question continuously for a period of four days by county, city and S.B.I. officers, initially he declined to even sign the waiver of rights form and talk to the officers, but at the insistence of his father capitulated (R p __). The initial interrogation according to Sheriff Yelton lasted "I would imagine at least an hour" (R p __). Subsequent interrogation began at 1:35 a.m. on the morning of the 28th of February and it apparently continued until about 4:30 a.m. While his father was present during many of the sessions, he was often there in uniform and while on duty as a police officer for the Town of Spindale (R p __). Furthermore Sheriff Yelton testified that the defendant's father suggested that he answer the questions (R p __). Additionally according to the testimony of both his mother and father, some of the facts in his statement were suggested to the defendant by the Sheriff (R p __).

(4) The defendant's mother, Dorothy Ruth Thompson, testified that the defendant had had mental problems since his youth and had been treated for them at Swannonoa and at the Rutherford County Mental Health Clinic. Dr. Robert Rollins, Director of the Forensic Unit at Doretha Dix Hospital testified that the defendant had an I.Q. of 55, was functioning as a mildly mentally retarded person, that his median educational level was of the fourth grade, that the defendant would be easily influenced by other people and easily intimidated. He further testified that the statement, which was taped indicated that he was under stress when he responded to questions put to him. Additionally that the statement was not made of his own free will, a conclusion enforced by the period of interrogation and the presence of his father. Finally, he concluded in his opinion that the statement was not voluntarily and willingly given (R p __).

(5) The defendant was arrested and detained without a warrant, he was not taken before a magistrate having jurisdiction to issue a warrant, and was unlawfully imprisioned for a period exceeding twenty-four hours before a warrant was issued, in violation of the twelve hour maximum limit fixed by GS 15-47.

At approximately 3:30 p.m. on the afternoon of February 27th, 1974, the defendant, Clarles D. Thompson, was brought to the Rutherford County jail, and was detained without a warrant and interrogated without the benefit of counsel.

Initially the interrogation pertained to the theft and location of a gun believed to have been involved in the commission of a homicide. But, at approximately 1:50 a.m. on the morning of the 28th of February the interrogation shifted with the defendant being viewed as a suspect in the commission of the capital crime of murder. (R p __)

This line of interrogation was continued, at various intervals, throughout the 28th of February and the 1st and 2nd of March and all without the benefit or assistance of counsel.(Rp__)

The record further discloses that late in the afternoon of February 28th, warrants were issued charging the defendant with first degree murder, and that questioning continued thereafter, for a period of time exceeding forty-eight hours without the benefit of counsel.

Furthermore, counsel was not appointed for the defendant until March 6, 1974, at a point in time, when all questioning of the defendant had closed. (R p __)

Sheriff Blane Yelton testified that about 5:20 p.m. on 27 February 1974, pursuant to his request, defendant's father, a sergeant on the police force in Spindale, North Carolina, brought defendant to the jail for the purpose of interrogation concerning a gun which had been taken from P. G. Woods. Defendant signed a waiver of his constitutional rights, including waiver of counsel, on this occasion, but the Sheriff stated "it is possible that he did not at first want to sign the waiver of rights and that his father told him to sign it. . . ." The Sheriff could not recall whether the murder of Watkins was mentioned at this first encounter. This interrogation lasted for over an hour, and upon its completion defendant was taken into custody upon authority of a telegram form the North Carolina Parole Board indicating a revocation of defendant's parole. Defendant was questioned several times during the night or early morning hours of 28 February. According to the Sheriff's notes, the second interrogation occurred at 1:35 a.m. on 28 February, and the last questioning during this interval took place about 5:00 a.m. on 28 February. He could not say whether defendant had any sleep or food during the night of 27 February. The Sheriff next questioned defendant at 1:55 p.m. on 28 February. At this time defendant's father was present, and defendant signed a waiver of his constitutional rights at the suggestion of his father. Prior to signing the waiver, defendant asked his father if he should

answer questions, and the father on two occasions said that it was up to him and another time or two told his son that he had nothing to hide and should therefore talk to the Sheriff. After signing the waiver, defendant made statements implicating Alexander Hamilton and Randy Wesley and also to some degree incriminating himself in the murder of Watkins. Another interrogation took place at 7:50 p.m. on 28 February in the prescence of Alexander Hamilton, Randy Wesley, Officers Hatcher, Simmons, Chambers, and the Sheriff. Following this interrogation defendant was charged with murder, and Hamilton and Wesley were released without being charged. On 1 March the Sheriff, together with Officers Hatcher and Pressley, questioned defendant for about an hour and a half concerning inconsistencies in his previous statements.

On 2 March defendant was again questioned and at that time told the Sheriff where he could find the murder weapon. Search for the weapon was made to no avail.

On the night of 2 March about 7:00 p.m. defendant's mother and father were allowed to talk to him, and after they had talked with him for about thirty minutes, defendant's mother told the Sheriff that defendant wanted to make a statement. On this occasion, in addition to the Sheriff, Officers Pressley, Hatcher, and defendant's mother and father were present. The Sheriff again advised defendant that he had a right to remain silent, that anything that he said could be used against him in a court of law, that he had a right to have an attorney present during any questioning, and that he did not have to answer any question until he talked to his attorney. In addition, the Sheriff stated that he read defendant's rights to him and that defendant signed a waiver of his constitutional rights, including waiver of counsel, before making any statement. The Sheriff denied that he ever told defendant that it might be easier on him if he confessed or that he would recommend the

death penalty if defendant did not tell the truth. He said that at this time defendant seemed remorseful and was crying part of the time.

Dorothy Thompson, defendant's mother, testified that when she talked to her son on 2 March, he told her that the Sheriff had told him that if defendant didn't tell the truth, the Sheriff would recommend the death penalty. At that time her son was very upset and was crying and trembling. Upon her inquiry the Sheriff told her that he told the defendant about the death penalty "to get him to tell the truth because he (the Sheriff) had been on so many wild goose chases." She gave testimony which indicated that defendant was mentally and emotionally unstable. She was present when defendant made his statements on 2 March, and, according to her testimony, the Sheriff on several occasions suggested details to which defendant consented. She admitted that defendant told her that he killed Watkins, but only after the Sheriff had mentioned the death penalty to him.

Forrest Thompson, defendant's father, testified that, prior to arriving at the Sheriff's Department on 27 February, he asked defendant whether he had killed Watkins, and defendant had replied in the negative. At the initial questioning, defendant at first refused to sign a waiver of rights, but he, the father, told him to go ahead and sign it. The witness stated that he so advised his son because "I felt like if he didn't kill the man, he could go ahead and talk to them freely." It was his opinion that had he not told his son to sign the waiver, the boy would not have signed it. The father was in the police station at that time as an officer of a municipality in Rutherford County, and if he had not been a policeman, he would have told his son not to say a word. With regard to the length of interrogation, the witness testified:

I brought him to the jail somewhere around 3:15 to 3:30 and I left the jail at approximately 5:00 am the next morning on the 28th. I stayed at the jail bacuase Charles was in the Sheriff's office being interrogated continuously from 3:30 p.m. until 5:00am the next morning. He never told the Sheriff that he had killed the deceased but he remained in the Sheriff's office all this time. He was placed in a cell at approximately 4:30 or a quarter to five, in fact the Sheriff never put him under arrest until about 2:00 am, no warrant was issued for him but the Sheriff kept telling him I've got papers to put you in the jailhouse right now but he never produced those papers until about 2:00 am. The papers were for vilation of probation and it was a telegram that he had received that gave him the authority to pick Charles up.

During the time I was at the jail he did not have anything to eat and I left about five a.m., none of us had anything to eat. There were quite a few men interrogating him, Sheriff Yelton, Earl Hatcher, Charles Chambers and Johnny Wilkins all interrogated him. I was not present during all of the interrogation. The room where the interrogation took place was an eight by ten room, everyone was sitting down at a table, there was no windows in the room..

During the interrogation he didn't appear nervous until over in the morning, then he got nercous. After I left at 5:00 am the next time I returned to the jail was about noon on the 28th and when I got to the jail he was in the Sheriff's office, but I didn't recall who was in there with him. When I went in he appeared nervous and he was sleepy then because he said he didn't get to bed until after he eat breakfast that morning and this was a little after noon then....."

REASONS FOR GRANTING OF THE WRIT

I. THE CONFESSION IN THIS CASE WAS NOT A VOLUNTARY ACT BORN OF THE FREE-WILL OF THE PETITIONER BUT RESULTED FROM THE SUSTAINED PRESSURE EXERTED ON HIM BY SHERIFF BLANE YELTON AND THE INSISTENCE BY THE PETITIONERS FATHER THAT HE SIGN THE WAIVER OF HIS CONSTITUTIONAL RIGHTS AND ANSWER THE SHERIFF'S QUESTIONS.

The use in a state criminal trial of a defendant's confession obtained by coercion whether physical or mental is forbidden by the Fourteenth Amendment. See: Brown v. State of Mississippi, 297 US 278, 56 S.Ct. 461, Linsenba v. People of State of California, 314 US 219, 62 S.Ct. 472. Mr. Justice Frankfurter referring to coerced confessions and speaking for the majority in Watts v. Indiana, 338 US 49, 69 S.Ct. 1347 (1949) said, "A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. Bur if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to question under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary."

Notwithstanding the fact that neither violence nor the threat of ciolence is used to extort a confession from a defendant, due process of law is denied by the admission into evidence of a confession obtained under circumstances whose totality presents a picture of substantial pressure overbearing the defendant's free will. HAYNES v. WASHINGTON, 373 US 503, 10 L Ed 513, 83 S Ct 735.

The Court in ROGERS said in part (5 L Ed 2d 766) "Our decision under the amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e. the product of coercion, either physical or psychological, can not stand. This is so, not because such confessions are unlikely to be true, but because of the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accustorial and not inquisitorial sustem - a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."

It should be noted that in ROGERS five of his six statements were apprently not true; while in the instant case the same number were apparently untrue. The Court further noted in ROGERS that attnetion should be forcused on whether the behavior of the law enforcement officer was such as to overbear the defendant's will to resist and bring about confessions not freely selfdetermined.

North Carolina's initial landmark case on the issue of voluntary confessions is STATE v. ROBERTS, 12 NC 259, where the Supreme Court said in part 1827, "Confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on and are therefore entirely to be rejected.

Psycholigical or mental coercion has long been recognized. PAYNE v. ARKANSAS, 356 US 560; 2 L Ed 2d 975, 78 S Ct 844. The test a pointed out in HAYNES v. WASHINGTON, supra, is totally of the circumstances. Among the factors to be considered are the defendant's age, record of former crimes, educational background, mental capacity, legality or illegality of his arrest, condition of his incarceration, prolonged questioning of the accused by the police, lack of food, and lack of counsel. SPANO v. NEW YORK, 360 US 315, 3 L Ed 2d 1265, 79 S Ct 1202; BLACKBURN v. Alabama, 361 US 199, 4 L Ed 2d 242, 80 S Ct 274; PAYNE v. ARKANSAS, supra.

It is true that the so-called MIRANDA warnings were given but the State must show that waiver of such rights is VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY made. MIRANDA v. ARIZONA, 384 US 478, 16 L Ed 2d 694.

that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. MIRANDA v. ARIZONA, 16 L Ed 2d 724.

It is respectfully submitted submitted that there was a continuous stream of events in the case at hand which was never interrupted so as to separate the events of February 27, 28 and March 1, 2 from the statement taken at 9:05 p.m. March 2. In Clewis v. Texas, 386, US 707, 18 L Ed 2d 423, 87 S Ct 1338, Clewis was convicted of the murder of his wife. Clewis was taken into custody at 6 a.m. July 8, 1962, and made his first statement in theevenig of July 9. His first statement proved to be inconsistent with the facts, as was his second, but his third confession was consistent and was relied on by the State during the trial. The issue was whether the third statement was voluntary. The Court ruled it was not, saying in part, "It plainly can not, on these facts, be separated from the circumstances surrounding the two earlier " confessions". There is no break in the stream of events from the time Sunday morning when petitioner was taken to the police station to the time Tuesday morning some nine days later that he signed the statement in issue, sufficient to insulate the statment from the effect of al that went before."

Relying on the above statement, the confession of March 2 of the defendant, CharlesThompson, wasnot insulated from all that had transpired before.

In the case of CULOMBE v. CONNECTICUT, 367 US 568, 6 L Ed 1037, 81 S Ct 1860, Arthur Culombe was arrested following a series of holdups and two murders. In a period of tem days, Culombe confessed five times orally, and signed three written confessions. The evidence disclosed that the defendaw was 33 years old, a mental defective with an I.Q. of 64 and a mental age of nine to nine and half years, who had been in trouble with the law since adolescence, was suggestible and could be intimated. Additionally his wife assisted law enforcement officers. The Court in an opinion written by Justice Frankfurter said in part, In such an atmosphere (police station), questioning that is long, continued even if it is only repeated at intervals, never protracted to the point of physical

exhaustion - inevitably suggests that the questioner has a right to, and expects an answer."

The Court added that in determining the voluntary or involuntary nature of a confession a three step process must be followed: (1) finding the external facts; (2) the imaginative recreation of internal psychological facts; (3) applying the psychological fact or standards to the rules of law and utilizing the factual circumstances through induction and anticipation. Relying on these facts and reasoning the United States Supreme Court ruled the confession involuntary and inadmissible.

It is respectfully submitted that the facts in the CULOMBE case are substantially indentical to the facts in Thompsons' case; and that, under the decision of the CULOMBE case, the use of the confession in Thompson's case was a violation of the due process clause of the Fourteenth Amendment.

II. THE PETITIONER, DURING HIS INTERROGATION BY SHERIFF BLANE YELTON OF RUTHERFORD COUNTY, AS A KIDNAPPING AND MURDER SUSPECT, WAS"DENIED THE ASSISTANCE OF COUNSEL" IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE CONSTITITION OF THE UNITED STATES AS "MADE OBLIGATORY UPON THE STATES" BY THE FOURTEENTH AMENDMENT, THEREBY RENDERING INADMISSIBLE IN THIS STATE CRIMINAL TRIAL ANY INCRIMINATING STATEMENTS ELICITED BY THE SHERIFF DURING THE INTERROGATIONS.

A defendant is entitled to counsel at every critical stage of the proceedings against him. STATE v. HILL, 277 NC 547, 552 (1970). North Carolina's General Assembly had provided in GS 7A-451(b) ... "entitlement to the services of counsel begin as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:

(1) An in-custody interrogation; . "North Carolina further provided in GS 7A-457(a) "A waiver shall not be allowed in a capital case." It is conceded that this provision was deleted by the General Assembly effective October 30, 1971; however, due process is violated where an accused is deprived of counsel for any part of the pre-trial proceedings, provided he is so prejudiced thereby as to infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice, the latter determination necessarily depending upon all circumstances of the case (Anno; Right to Counsel, 2 L Ed 2d 1644, citing CROOKER v. CALIFORNIA, 357 US 433, 2 L Ed 2d 1448, 78 S Ct 1287 (1958))

Under the circumstances, was the defendant's trial infected and therefore prejudiced by the lack of the assistance of counsel. The answer is yes; and the conviction of the defendant by State, wherein great weight was given by the State to the defendant's statement taken after he was arrested, after a warrant had been issued and served, and formal charges had been lodged, was taken at a critical stage when adversary judicial proceedings had been initiated against him.

Indigency has been held by this Court to be an unreasonable basis for denying one of his right to represent one's self and waive counsel in a capital case. STATE v. MEMS, 281 NC 658. The defendant would respectfully submit that in light of the decision in STATE v. WADDELL, 282 NC 431, making the death penalty mandatory for certain crimes; that neither indigent or affluent should be permitted to waive counsel when faced with the imposition of the ultimate punishment.

Futhermore it has been held that the prompt appointment of counsel in a capital case is mandatory and required by statute, the State Constitution and the Due Process Clayse of the Fourteenth Amendment to the Constitution of the United States, STATE v. SAMPSON, 243 NC 436; STATE v. PEARCE, 266 NC 234. The statute referred, GS 15-4.1 was repealed effective July 1, 1969, but nowhere has such an amendment occured in either the State Constitution or the Due Process Clause of the Fourteenth Amendment to the Constitu-

tion or the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States: therefore, appointment of Counsel was mandatory and a delay of seven days, in light of what transpired, can not be deemed prompt.

The petitioner submits that he did not understandingly and intelligently refuse the offer of counsel by Sheriff Yelton before he gave the self-incriminating confession. That though his father stated that he would employ private counsel, no counsel was appointed until after the petitioner had confessed. That under those circumstances, it must be held that he was denied the assistance of counsel in violation of his rights under the Fourteeth Amendment of the Constitution of the United States. ESCOBEDO v. ILLINOIS, 378 U.S. 478 (1964).

CONCLUSION

The petitioner submits that his aforesaid confession was involuntary and that the decision of this show that under the circusmtances shown herein, the admitting same into evidence denied to him his rights as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

That he was denied the assistance of counsel in violation of his rights as guaranteed by the Sixth Amendment of the Constitution of the United States as made obligatory on the States by the Fourteenth Amendment.

Respectfully submitted,

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SUPREME COURT OF NORTH CAROLINA — SPRING TERM 1975

STATE OF NORTH CAROLINA

v. — No. 41 - Rutherford

CHARLES D. THOMPSON

Appeal from Martin (Robert M.), S.J., May 1974 Special Term of Rutherford County Superior Court.

Defendant was tried upon two bills of indictment, proper in form, charging the murder and kidnapping of Van Gudger Watkins. Prior to trial defendant moved (1) for change of venue or special venire on grounds of adverse pretrial publicity and (2) for dismissal because of denial of effective assistance of counsel. Both of these motions were denied.

The State's evidence tended to show the following facts:

Terry Watkins, nephew of the victim, testified that on 18 February 1974 decedent bought a 1972 Chevrolet four-door hardtop from him. On the following Wednesday morning (20 February 1974), he saw the same automobile which he had sold to his uncle. The windows of the car were smoke-stained, and one could not see into the car.

Clarence Simmons, of the Rutherford County Sheriff's Department, testified that he had known decedent and that he observed his body at a rural cemetery at Doggett's Grove in Rutherford County about 7:45 p.m. on 20 February. The body was lying face down on the ground and was clothed in trousers, cowboy boots, a hat, a yellow shirt, and a blue denim jacket. There was blood on the face. The body was taken to the hospital morgue, where an autopsy was conducted by Dr. Paul Hurt in the presence of the witness and three other law enforcement officers.

Dr. J. Paul Hurt, stipulated to be an expert in the field of pathology, testified that he conducted an autopsy on the body of Van Watkins on 21 February 1974 in the presence of law enforcement officers. His examination revealed that decedent had been shot at least four times; two wounds appeared in the left upper chest, two wounds in the right back. One of the bullets in the left upper chest had traveled through the right ventricle of the heart and entered the abdominal

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cavity. This wound caused perforation of the heart and resulted in death. Decedent also received a blow on his head which caused compound skull fractures, but this blow was inflicted after death. The doctor removed from the body four bullets which he gave to one of the law enforcement officers.

Sheriff Blaine Yelton testified that he had a conversation with defendant about 9:02 p.m. on 2 March 1974, in the presence of defendant's parents, Earl Hatcher, and Hollis Pressley. Upon defendant's objection to the admission of statements made during this conversation, the trial judge excused the jury and conducted a voir dire hearing. Detailed facts relating to the evidence on voir dire appear in the opinion. After conducting the voir dire, the trial judge made findings of fact and concluded that the statement made on this occasion was freely, understandingly, voluntarily, and intelligently made after a voluntary and intelligent waiver of right to counsel.

The jury returned, and the witness testified before the jury that defendant told him that he had killed Van Watkins. On 19 February 1974, between 7:00 and 7:30 defendant was walking up a street in Forest City when he saw decedent drive up, get out of his car, and reach into his pocket to pull out his keys. As decedent reached into his pocket, a roll of money fell out. Defendant then decided to rob decedent. After Watkins entered his establishment, defendant followed him inside, and by use of a .22 revolver forced him to re-enter his car. They then drove to the cemetery at Doggett's Grove, where Watkins gave him the money and told him that he would never get away with the crime. He then shot Watkins five times because he knew that decedent could identify him. In order to be sure that decedent was dead, defendant hit him on the back of the head with a large piece of concrete. Defendant proceeded to Shelby in Mr. Watkins' automobile and rented a room at the Governor's Inn Motel, where he later brought his girl friend, Vanessa Whitworth. They watched television and then went to bed. During their stay at the motel, he showed her the gun and the money and told her that he got the money from a credit union. There-

after he drove the automobile to an area behind Dunbar School and set it afire. On 25 February he hid the pistol in a tree. A few minutes after completing this statement, defendant took the Sheriff and other officers to the tree, where they retrieved the pistol. He admitted that he took the gun from P. G. Woods's automobile on 19 February.

On cross-examination the Sheriff testified as to two previous, exculpatory statements which defendant had made, including one which inculpated two other persons who were subsequently exonerated. He denied that he told defendant that, unless he confessed to the crime, he would have to recommend the death penalty. This answer brought an angry and disruptive response from defendant, who threw law books at the Sheriff and shouted at him to "quit lying." The trial judge excused the jury during defendant's outburst, admonished defendant to keep quiet on pain of contempt or other measures to control his disruptive conduct, and declared a recess. At the end of the recess, the Court denied defendant's motion for mistrial based upon defendant's own outburst.

Vanessa Whitworth testified that she was with defendant on the night of 19 February 1974 in his room at the Governor's Inn Motel in Shelby. She did not remember what kind of car defendant was driving on that night but stated that she remembered the word "Impala" on the dashboard. During her stay at the motel, she saw a gun in a drawer, and she saw defendant put three empty shells in an ashtray in the room.

On cross-examination, she stated that the officers who came to question her told her that, if she did not tell the truth, she could be charged with murder and get the death penalty. She did not recall anyone's telling her that defendant was going to get the death penalty.

The State offered evidence through S.B.I. agents which tended to show that the pistol which defendant pointed out to the officers (State's Exhibit 4) was the weapon which fired the bullets taken from the body of deceased.

P. G. Woods testified that on 17 February 1974 defendant rode with him to their place of employment, Fieldcrest Mills. Before getting out of the car at the plant, the witness opened the glove compartment

to get some matches. In the glove compartment at that time was a .22 caliber pistol. The witness locked his car upon leaving it. They arrived at work about 11:00 p.m. About 5:00 a.m. the following morning, defendant told the witness that he had caught up with his work and that he wanted the keys to the car so that he could lie down in the car until witness got off at 7:00 a.m. He gave the keys to the car to defendant but did not authorize him to take it anywhere. When his shift was over, he saw that his car had been moved in the parking lot. He found defendant in the car, and they went home. When the witness arrived at home, he did not lock his car. That afternoon about 3:00 p.m., he went to the glove compartment for some matches, discovered that the revolver was missing, and reported the theft to the Forest City Police Department. The witness identified State's Exhibit 4 as being the pistol which was in his glove compartment. He testified that the pistol was loaded with six rounds of ammunition at the time it was taken.

The State rested, and defendant unsuccessfully moved for judgment as of nonsuit.

Both of defendant's parents testified in his behalf as to his prior emotional problems and to circumstances surrounding his confession.

At the close of all the evidence, defendant renewed his motion for judgment as of nonsuit, which motion was again denied.

The jury returned a verdict of guilty as charged in both bills of indictment, and the Court imposed the mandatory sentence of death on the murder charge and life imprisonment on the kidnapping charge. Defendant appealed.

Attorney General James H. Carson, Jr., by Assistant Attorney General Charles M. Hensey, for the State.

Robert W. Wolf and Charles V. Bell for defendant.

BRANCH, Justice.

Defendant assigns as error the trial judge's denial of his motion for change of venue or for a jury to be summoned from a county other than Rutherford. Defendant based his motion on the grounds that

the prominence of the victim and the inflammatory publicity contained in the local newspapers would prevent a fair trial in Rutherford County or by jurors drawn from that county. After considering defendant's affidavit, the record, and oral arguments of counsel, Judge Martin denied defendant's motion.

The newspaper accounts upon which defendant depends do not appear to be beyond the bounds of propriety or to be inflammatory. Neither does defendant show that the prominence of the victim has unfairly affected his trial. This record does not disclose that defendant exhausted his peremptory challenges or that defendant had to accept any juror objectionable to him.

Defendant's motion was addressed to the sound discretion of the trial judge. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721; State v. Blackmon, 280 N.C. 42, 185 S.E.2d 123; State v. Ray, 274 N.C. 536, 164 S.E.2d 457. No abuse of discretion on the part of the trial judge is shown.

This assignment of error is overruled.

The principal question presented by this appeal is whether the trial judge erred in denying defendant's motion to suppress evidence of in-custody statements made by defendant to police officers.

During the direct examination of Blaine Yelton, Sheriff of Rutherford County, the solicitor inquired about statements made by the defendant to the Sheriff. Upon defense counsel's objection, the jury was excused and a voir dire hearing conducted.

On voir dire Sheriff Yelton testified that about 5:20 p.m. on 27 February 1974, pursuant to his request, defendant's father, a sergeant on the police force in Spindale, North Carolina, brought defendant to the jail for the purpose of interrogation concerning a gun which had been taken from P. G. Woods. Defendant signed a waiver of his constitutional rights, including waiver of counsel, on this occasion, but the Sheriff stated "it is possible that he did not at first want to sign the waiver of rights and that his father told him to sign it . . . ." The Sheriff could not recall whether the murder

of Watkins was mentioned at this first encounter. This interrogation lasted for over an hour, and upon its completion defendant was taken into custody upon authority of a telegram from the North Carolina Parole Board indicating a revocation of defendant's parole. Defendant was questioned several times during the night or early morning hours of 28 February. According to the Sheriff's notes, the second interrogation occurred at 1:35 a.m. on 28 February, and the last questioning during this interval took place about 5:00 a.m. on 28 February. He could not say whether defendant had any sleep or food during the night of 27 February. The Sheriff next questioned defendant at 1:55 p.m. on 28 February. At this time defendant's father was present, and defendant signed a waiver of his constitutional rights at the suggestion of his father. Prior to signing the waiver, defendant asked his father if he should answer questions, and the father on two occasions said that it was up to him and another time or two told his son that he had nothing to hide and should therefore talk to the Sheriff. After signing the waiver, defendant made statements implicating Alexander Hamilton and Randy Wesley and also to some degree incriminating himself in the murder of Watkins. Another interrogation took place at 7:50 p.m. on 28 February in the presence of Alexander Hamilton, Randy Wesley, Officers Hatcher, Simmons, Chambers, and the Sheriff. Following this interrogation defendant was charged with murder, and Hamilton and Wesley were released without being charged. On 1 March the Sheriff, together with Officers Hatcher and Pressley, questioned defendant for about an hour and a half concerning inconsistencies in his previous statements.

On 2 March defendant was again questioned and at that time told the Sheriff where he could find the murder weapon. Search for the weapon was made to no avail.

On the night of 2 March about 7:00 p.m. defendant's mother and father were allowed to talk to him, and after they had talked with him for about thirty minutes, defendant's mother told the Sheriff that defendant wanted to make a statement. On this occasion,

In addition to the Sheriff, Officers Pressley, Hatcher, and defendant's mother and father were present. The Sheriff again advised defendant that he had a right to remain silent, that anything that he said could be used against him in a court of law, that he had a right to have an attorney present during any questioning, and that he did not have to answer any question until he talked to his attorney. In addition, the Sheriff stated that he read defendant's rights to him and that defendant signed a waiver of his constitutional rights, including waiver of counsel, before making any statement. The Sheriff denied that he ever told defendant that it might be easier on him if he confessed or that he would recommend the death penalty if defendant did not tell the truth. He said that at this time defendant seemed remorseful and was crying part of the time.

Dorothy Thompson, defendant's mother, testified that when she talked to her son on 2 March, he told her that the Sheriff had told him that if defendant didn't tell the truth, the Sheriff would recommend the death penalty. At that time her son was very upset and was crying and trembling. Upon her inquiry the Sheriff told her that he told the defendant about the death penalty "to get him to tell the truth because he [the Sheriff] had been on so many wild goose chases." She gave testimony which indicated that defendant was mentally and emotionally unstable. She was present when defendant made his statements on 2 March, and, according to her testimony, the Sheriff on several occasions suggested details to which defendant consented. She admitted that defendant told her that he killed Watkins, but only after the Sheriff had mentioned the death penalty to him.

Forrest Thompson, defendant's father, testified that, prior to arriving at the Sheriff's Department on 27 February, he asked defendant whether he had killed Watkins, and defendant had replied in the negative. At the initial questioning, defendant at first refused to sign a waiver of rights, but he, the father, told him to go ahead and sign it. The witness stated that he so advised his son because "I felt like if he didn't kill the man, he could go ahead

and talk to them freely." It was his opinion that had he not told his son to sign the waiver, the boy would not have signed it. The father was in the police station at that time as an officer of a municipality in Rutherford County, and if he had not been a policeman, he would have told his son not to say a word. With regard to the length of interrogation, the witness testified:

> I brought him to the jail somewhere around 3:15 to 3:30 and I left the jail at approximately 5:00 a.m. the next morning on the 28th. I stayed at the jail because Charles was in the Sheriff's office being interrogated continuously from 3:30 p.m. until 5:00 a.m. the next morning. He never told the Sheriff that he had killed the deceased but he remained in the Sheriff's office all this time. He was placed in a cell at approximately 4:30 or a quarter to five, in fact the Sheriff never put him under arrest until about 2:00 a.m., no warrant was issued for him but the Sheriff kept telling him I've got papers to put you in the jailhouse right now but he never produced those papers until about 2:00 a.m. The papers were for violation of probation and it was a telegram that he had received that gave him the authority to pick Charles up.
>
> * * *
>
> During the time I was at the jail he did not have anything to eat and I left about five a.m., none of us had anything to eat. There were quite a few men interrogating him, Sheriff Yelton, Earl Hatcher, Charles Chambers and Johnny Wilkins all interrogated him. I was not present during all of the interrogation. The room where the interrogation took place was an eight by ten room, everyone was sitting down at a table, there were no windows in the room.
>
> During the interrogation he didn't appear nervous until over in the morning, then he got real nervous. After I left at 5:00 a.m. the next time I returned to the jail was about noon on the 28th and when I got to the jail he was in the Sheriff's office, but I don't recall who was in there with him. When I went in he appeared nervous and he was sleepy then because he said he didn't go to bed until after he eat [sic] breakfast that morning and this was a little after noon then.

The witness further testified that he himself, at the direction of the Sheriff, arrested Alexander Hamilton, whom defendant first implicated in the criminal act. This individual was later released when it appeared that he had nothing to do with the crime. The father also stated that his son made five confessions in reference to this case, all of which statements were reduced to

writing by the Sheriff. He said that two of the confessions were taped and that during these taped sessions, "the Sheriff would ask Charles about it and go over it and if Charles wouldn't say anything about it the Sheriff would go back until he got it down to just where he wanted it. He would get it down to where he wanted it and then say let's tape it. On one occasion Charles refused to tape it, but I myself asked him to go ahead and tape it. . . ."

> I did not tell him to sign all of the waivers, I told him to sign the first one, and I directed him to sign the last one. Charles refused to sign the last one until I directed him to so do, he was crying very heavily and trembling and lying on my wife's lap. That's when I kept telling him that the Sheriff and what he had said about the death penalty didn't mean anything. I am definitely convinced that the Sheriff told my son about the death penalty.

On cross-examination the witness said that the law enforcement officers advised defendant of his rights every time that he, the father, was present at the questioning but that he was not there all the time when the Sheriff was asking questions. He conceded that the Sheriff had no control over him, could not fire him, and could not order him to do anything. The services he performed in the investigation of the case and in the taking into custody of the others implicated by his son were services done at the request of the Sheriff. The father explicitly stated that the services he rendered were done as "a private citizen."

Sheriff Yelton, recalled on voir dire, testified that he could not recall confronting defendant with his prior criminal record, "but it is possible that I did." The Sheriff further denied making suggestions to defendant as to what he should say in his confession and stated that counsel was not appointed for defendant immediately after he was charged because defendant's father told him that they were going to employ private counsel. He stated that the father's involvement in the case was more a matter of courtesy than of law enforcement activity.

Dr. Robert Rollins, a licensed physician and specialist in psychiatry, Director of Forensic Services for the Division of Mental

Health Services of the North Carolina Department of Human Resources and Director of the Forensic Unit at the Dorothea Dix Hospital in Raleigh, testified that, as a result of the psychiatric evaluation of defendant at Dorothea Dix Hospital in April, 1974, he had formed certain conclusions with regard to defendant's mental condition. He indicated that defendant had an I.Q. of 55, which indicated that he was mildly mentally retarded, "a person whose intellectual functioning is below the average, particularly in the areas of judgment." He further stated that in the three areas tested, defendant functioned at fifth-grade level in reading ability, third-grade level in spelling, and fourth-grade level in arithmetic. He stated that defendant was easily influenced by other people, "more easily intimidated than the average person," although, of course, most average people can be intimidated. He stated that as a result of hearing the tape played in open court prior to his testimony, he felt that "Mr. Thompson was obviously upset and under stress at the time he gave an opening account of the events that he was asked about and that he responded to various questions that were put to him." He further stated that defendant was, in his opinion, "a person who had some diminished responsibility although I do consider him to be responsible under the usual rules and circumstances that you describe, but it is my opinion that he is influenced by other people to waive his rights." In short, it was the witness's opinion that, with regard to the waiver of rights, defendant "was not acting of his own free will." In summary, the doctor's opinion was as follows:

> It is my honest feeling that that statement reflected not so much a willing and voluntary accounting of the events recalled by the defendant as it did agreeing that the facts put to him by other persons were correct. I, of course, have only heard that one time.

On cross-examination by the solicitor, the witness stated that his assessment of the situation was that defendant "found himself in trouble and first tried to get out of it as people often do, but characteristically mentally retarded people do so by saying they had nothing to do with it. He was through circumstances urged by his father to participate in the process and his next story was that it

wasn't him but some other people then if I understand it correctly the next story was that it was just him." The witness further testified that a person with defendant's I.Q. could satisfactorily perform in a textile plant, "and I think with some effort he could pass the North Carolina driver's license exam."

The State presented other evidence with regard to the taking and the transcribing of defendant's statement, all of which evidence tended to show that defendant voluntarily waived his rights and made a statement in accordance with the requirements of Miranda and that his utterances were freely and voluntarily made.

After hearing the evidence, the Court made the following findings of fact:

> The Court finds as a fact from the testimony that Charles Thompson was interrogated by the Sheriff of Rutherford County several times commencing in the afternoon of February 27th and concluding on March 2, 1974, in connection with the investigation of the death of Van Watkins; that on February 27, 1974, the Defendant was brought to the Sheriff's office by the Defendant's father and thereafter legally held in jail by reason of a parole violation; that before any questioning by the Sheriff he was warned of his Constitutional rights and signed a waiver of his rights which appear of record.
>
> The Court further finds that after interrogation on several occasions the law enforcement officers would check out the matters brought out on interrogation and upon discovering inconsistencies and confronting the Defendant, other statements were made by the Defendant, later implicating other persons who were formerly charged along with the Defendant with the murder of Van Watkins; that upon each interrogation the Defendant was warned of his Constitutional rights and each time signed a waiver of those rights; that subject to the implication of other persons by the Defendant and on the evening of March 2, 1974, the Defendant's mother and father visited him in the jail and were allowed to confer with their son in private and thereafter informed the Sheriff that their son wished to talk with him and that a statement was made by the Defendant on the evening of March 2, 1974, which appears of record.
>
> The Court finds as a fact that before making any statement and before he was interrogated, the Defendant was warned by the Sheriff of his Constitutional rights; that he was advised before any questions were asked him that he must understand his rights; that he had the right to remain silent and not make any statement; that anything he said could and would be used against him in a Court; that he had the right to talk to a lawyer

for advice before he was asked any questions; that he had the right to have anyone else with him that he requested that he was advised that if he could not afford a lawyer, one would be appointed by the Court before any questioning; that if he desired to answer questions without a lawyer present, he had the right to stop answering questions at any time; that he had the right to stop answering questions until he had the opportunity to talk to a lawyer.

The Court further finds that the Defendant signed a waiver of his rights on each occasion before he was interrogated to the effect that he had read a statement of his rights and understood what his rights were; that he was willing to make a statement and answer questions; that he did not want a lawyer at that time; that he understood what he was doing and that no pressure or threat had been made to him and no threat or coercion had been used against him by anyone; that each of these warnings and waiver of rights has been offered by the State and has been received in evidence for the purpose of the Voir Dire.

The Court further finds as a fact that the defendant's father has engaged in law enforcement for the past ten years; that for the past four years he has been a police officer for the Town of Spindale; that prior to that time he was a deputy sheriff for Rutherford County; that he accompanied his son to the Sheriff's office on February 27th and remained with him throughout the night and was present during the questioning by the Sheriff's Department; that thereafter he visited his son in the jail and in the Sheriff's office from time to time for the next several days; that the Defendant's mother visited her son at the jail and at the Sheriff's Department several times during the period from February 27th until March 2nd; that the parents of the Defendant were never refused the right to see and talk with their son both in the company of the Sheriff and privately; that the Defendant had the opportunity of rest in the jail facilities and the opportunity to have regular meals in the jail; that the Rutherford County jail was a practically new building, being less than a year old, and was equipped with proper and adequate facilities for caring for persons incarcerated therein.

The Court further finds that the Defendant is 19 years of age and is mildly retarded, went through the 9th grade, holds a valid North Carolina driver's license since he was 16 years of age and for some time prior to February 27, 1974, was regularly employed in the textile industry and that he knows the difference between right and wrong.

The Court further finds as a fact that subsequent to the implication of other persons by the Defendant in connection with the death of Mr. Van Watkins the Defendant's father and mother voluntarily went to the jail of Rutherford County and was there allowed to talk privately with their son; that after talking with their son for some period of time the Defendant's

mother went to the Sheriff and informed him that their son had a statement to make to the Sheriff; that thereupon the Sheriff in the presence of the Defendant's mother and father and in the presence of Mr. Hatcher of the State Bureau of Investigation and in the Sheriff's private office again warned the Defendant of his Constitutional rights; that he was advised that before any questions were asked he must understand his rights; that he had the right to remain silent and not make any statement; that anything he said could and would be used against him in a Court;

That he had the right to talk to a lawyer for advice before any questions were asked him or have with him anyone else during questioning; that if he could not afford a lawyer, one would be appointed for him by the Court before any questioning, but if he desired to answer questions without a lawyer present that he had the right to stop answering questions at any time; he also had the right to stop answering questions at any time until he talked to a lawyer; that the Defendant signed a waiver of rights which appears as State's Exhibit No. 3 for the Voir Dire to the effect that he had read the statement of his rights and understood what they were; that he was willing to make a statement and answer questions; that he did not want a lawyer at that time; that he understood and knew what he was doing; that no promises or threats had been made to him and no pressure or coercion of any kind had been used against him by anyone; that the rights and waiver of rights included on one sheet of paper and entitled State's Exhibit No. 3 was signed by Charles Thompson and witnessed by Sheriff Yelton and Earl Hatcher at 9:02 P.M. on March 2, 1974.

The Court finds as a fact that opportunity to exercise the constitutional rights of the Defendant were accorded to the Defendant throughout the interrogation; that he thoroughly and fully understood his rights;

That the defendant requested no attorney and did not refuse to make a statement to Sheriff Yelton; and by doing so, knowingly, intelligently and understandingly waived any constitutional rights accorded to the Defendant and intelligently, knowingly and affirmatively waived the right to have counsel present with him at the time of making a statement to Sheriff Yelton.

The Court finds that the Defendant freely, understandingly, voluntarily and intelligently made a statement to Sheriff Yelton at approximately 9:05 P.M. on March 2, 1974, without undue influence, coercion or duress and without any promise, threat, reward or hope of reward; that he had been fully advised of his constitutional rights and understood his rights; that after being advised of his rights he knowingly and intelligently waived his right to counsel at the time of interrogation and making of statement to Sheriff Yelton.

> It is therefore adjudged that the Defendant's answers and statement to Sheriff Yelton are competent and can be admitted into evidence before the jury.

Upon the motion to suppress, the trial judge properly excused the jury and conducted a voir dire hearing to determine the admissibility of the challenged in-custody statements. State v. Gray, 268 N.C. 69, 150 S.E.2d 1, cert. denied, 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed. 2d 784. It is now well settled in this jurisdiction that after conducting a voir dire hearing, the trial judge's findings of fact, if supported by competent evidence, are conclusive and binding on the appellate courts. Nevertheless, the conclusions of law drawn from the facts found are reviewable by the appellate division. State v. Pruitt, 286 N.C. 442, 213 S.E.2d 92; State v. Hines, 266 N.C. 1, 145 S.E.2d 363. In State v. Pruitt, supra, we said:

> In instant case there was plenary evidence that the procedural safeguards required by the Miranda decision were recited by the officers and that defendant signed a waiver stating that he understood his constitutional rights, including his right to counsel. Even so, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made. State v. Bishop, supra; State v. Gray, supra; State v. Conyers, 267 N.C. 618, 148 S.E.2d 500; State v. Rogers, 233 N.C. 390, 64 S.E.2d 572. The fact that the technical procedural requirements of Miranda are demonstrated by the prosecution does not, however, standing alone, control the question of whether a confession was voluntarily and understandingly made. The answer to this question must be found from a consideration of the entire record. Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242; State v. McCloud, 276 N.C. 518, 173 S.E.2d 753.

Here, as in Pruitt, there was ample evidence that the procedural safeguards required by Miranda were employed by the officers upon the taking of the statements from defendant. Nevertheless, we must still determine whether, under all of the surrounding circumstances, defendant voluntarily and understandingly made the inculpatory statements.

Some of the factors to be considered in deciding whether a statement is voluntarily and understandingly made are set forth in the case of State v. Wright, 274 N.C. 84, 161 S.E.2d 581. There Justice Huskins, speaking for the Court, said:

> "The test of admissibility is whether the statement by the defendant was in fact made voluntarily." State v. Gray, 268 N.C. 69, 150 S.E. 2d 1. See also State v. Rogers, 233 N.C. 390, 64 S.E. 2d 572; State v. Connell, 208 N.C. 401, 181 S.E. 323; State v. Livingston, 202 N.C. 809, 164 S.E. 337. The admission is rendered incompetent by circumstances indicating coercion or involuntary action. State v. Guffey, 261 N.C. 322, 134 S.E. 2d 619. The "totality of circumstances" under which the statement is made should be considered. State v. Chamberlain, 263 N.C. 406, 139 S.E. 2d 620. Mental capacity of the defendant, State v. Whittemore, 255 N.C. 583, 122 S.E. 2d 396, whether he is in custody, State v. Guffey, supra, the presence or absence of mental coercion without physical torture or threats, State v. Chamberlain, supra, are all circumstances to be considered in passing upon the admissibility of a pretrial confession and in passing upon the voluntariness of a waiver of constitutional rights. [Emphasis supplied.]

The fact that the defendant was youthful and that he made the challenged statements in the presence of police officers does not render the statements inadmissible, absent mistreatment or coercion by the officers. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561; State v. Murry, 277 N.C. 197, 176 S.E.2d 738. Neither does a subnormal mentality, standing alone, render a confession incompetent if it is in all other respects voluntarily and understandingly made. If a person has the mental capacity to testify and to understand the meaning and effect of statements made by him, he possesses sufficient mentality to make a confession. Nevertheless, his mental capacity, or his lack of it, is an imprtant factor to be considered in determining the voluntariness of a confession. Blackburn v. Alabama, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed.2d 242; State v. Thorpe, 274 N.C. 457, 164 S.E.2d 171; State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396.

In this case defendant is a nineteen-year-old mildly retarded person who, according to an expert witness, was more easily intimidated than the average person. He was described by Dr. Rollins as "a person who has some diminished responsibility although I do

consider him to be responsible under the usual rules and circumstances." It would seem to follow that a person who is responsible under usual circumstances possesses sufficient intelligence to testify and to know the meaning and effect of a confession. We, therefore, are of the opinion that defendant's youth and his lack of high mentality, standing alone, were not sufficient to render his confession involuntary. Nor does the fact that the confession occurred after prolonged interrogation necessarily render the statement involuntary. 29 Am.Jur.2d Evidence § 550 at 605. There remains, however, the decisive question of whether coercion rendered defendant's in-custody statements involuntary and therefore inadmissible into evidence.

State v. Edwards, 282 N.C. 201, 192 S.E.2d 304, is in many respects factually similar to instant case. There the defendant [illegible] the night of 23-24 September 1971. He was advised of his constitutional rights and at that time denied any knowledge of the crime. On the night of 24 September defendant was again questioned, and while the interrogation was under way, a bondsman for defendant in another case "turned him in." He was then in custody, and the questioning continued until about 1:30 a.m., at which time he began to cry and made inculpatory statements. The Miranda warnings were given, but defendant was without counsel and was without the advice of friends or family at that time. This Court held that a confession so elicited was not voluntarily made.

In the landmark case of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 602, 16 L.Ed.2d 694, defendant, a seriously disturbed, uneducated boy who was plagued with sexual fantasies, confessed after being interrogated for two hours by police officers. He was not advised of his right to counsel, and at trial the confession was offered into evidence. The Supreme Court found error in the admission of the confession and used the case as the vehicle for the now familiar procedural safeguards required in all cases involving inculpatory statements.

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In Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977, the defendant, a twenty-two-year-old Mexican boy, was in police custody and made incriminating statements after having been denied the right to consultation with his employed counsel, who was on the premises seeking to see his client. In that case the police urged the defendant to make a statement without advising him of his right to remain silent. The Supreme Court held that under these circumstances it was error to admit the confession into evidence.

In State v. Thorpe, SUPRA, our Court rejected a confession made by a retarded twenty-year-old accused who was not advised of his right to counsel at the time of his interrogation.

In Davis v. North Carolina, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895, a confession was obtained after defendant, an escaped prisoner, was taken into custody and interrogated daily for sixteen days. During that time neither family, friends, nor counsel saw defendant. His arrest sheet contained a memorandum, in part, as follows: "Do not allow anyone to see defendant or allow him to use the telephone." He was fed two sandwiches a day, sometimes supplemented by "peanuts and stuff." Defendant had stated that he had stolen certain goods found in his possession from a place on the railroad between Canton and Asheville. While handcuffed, he was walked along the railroad from Canton to Asheville and was unable to point out the place from which he had stated that he stole the property. He was carried to the scene of the crime in order to observe his reactions. The trial court admitted the confession, but the Supreme Court reversed, stating:

> . . . Davis went through a prolonged period in which substantial coercive influences were brought to bear upon him to extort the confessions that marked the culmination of police efforts. Evidence of extended interrogation in such a coercive atmosphere has often resulted in a finding of involuntariness by this Court. [Citations omitted.] . . .

Instant case differs from the above-discussed cases in which confessions were held to have been erroneously admitted. In none of these cases were there members of the family, friends, or counsel of

t he accused present during the questioning. We find cases from other jurisdictions which present factual situations more similar to instant case and provide guidance for our decision.

In Atwell v. State, 244 Ark. 739, 427 S.W.2d 1, the defendant challenged the voluntariness of the confession of guilt. The Court upheld the voluntariness of the confession and specifically pointed to the facts that one of the police officers present during the interrogation was the accused's brother and that that officer did not testify at the trial as constituting "a persuasive indication that the accused's constitutional rights were not infringed." The Court also noted that the defendant admitted on cross-examination that he was informed of his rights and that subsequent to that information he did make an admission of guilt.

[illegible] contended that there was error in the introduction into evidence of his written confession on the ground, inter alia, that his mother exhorted him to tell the truth. In rejecting his contention, the Court stated: "It is true defendant's mother exhorted him to tell the truth prior to his confession. She was present while the deputy Bonvillain talked to her son. The evidence, however, refuted any suggestion of intimidation or coercion. Under the circumstances, the mother's exhortation does not render the confession involuntary."

Likewise, in Anglin v. State, 230 So.2d 752 (Fla. App.), the defendant, a fifteen-year-old boy, contended that he was coerced into making a confession by remarks of his mother. The testimony of the arresting officer revealed that the mother, who was with the defendant at the time of his arrest, told him to tell the truth, or "she would clobber him." Prior to interrogation, the defendant's rights were explained to him, and he and his mother each signed a card acknowledging that they understood his rights. The mother again told him to tell the truth about what had happened, and at this time he gave a statement implicating himself in the crime. In rejecting the defendant's contention that he was coerced, the Court stated:

> It may well be that an admonition by a parent to her teen-age son to tell the truth is held in some psychological circles to constitute a deprivation of the child's constitutional rights. We have not reached such a conclusion in this jurisdiction. The moral upbringing of a child to be a useful citizen necessarily encompasses advice by a parent for the child to be truthful. The motherly concern of this parent for her offspring and at the same time her concern for the basic precepts of morality are to be commended. We find no element of a threat or coercion on the part of this mother and hold that the controverted confession was freely and voluntarily given by the appellant.

In Fuller v. United States, 407 F.2d 1199 (D.C. Cir.), cert. denied, 393 U.S. 1120, 89 S.Ct. 999, 22 L.Ed.2d 125, the defendant's mother, of her own volition, went to the place where defendant was being held and asked to speak with her son. The officer who had the defendant in custody replied that he had no objection to the mother's talking to her son but that, because he had the responsibility for defendant, he would have to remain present during their conversation. The defendant had previously been warned of his rights and had thereafter made an inculpatory statement to the police. When the officer explicitly indicated to the defendant that he would have to remain present during this conversation with his mother, the defendant replied that the officer's presence would "be all right." At no time was the officer's presence during this conversation objected to by either the defendant or his mother. With the officer present, the mother asked the defendant what he had done, and the defendant repeated his prior admission that he had killed a woman. The Court, noting that both the mother and the son were aware of, and acquiesced in, the presence of the officer, and that defendant had been advised of his rights, held that there was no error in admitting into evidence the defendant's admission of guilt made to his mother during this conversation.

Finally, we find particular guidance in State v. Estrada, 63 Wis.2d 476, 217 N.W.2d 350. In that case, the defendant was arrested, advised of his constitutional rights, and further advised of the particulars of the case. In response to official inquiry, the defendant stated that he understood his rights and questioned the detective as

f[illegible]hat evidence led the police to believe that he was involved. He talked freely with the police about his whereabouts during the night of the crime in question, and at no time during this initial interrogation did he exercise his right to silence by requesting that the interrogation cease. After approximately an hour and fifteen minutes of interrogation the defendant was booked and placed in the jail for the night. On the following morning, after a routine lineup, the defendant was taken to the District Attorney's office, where he was again advised of his rights by the District Attorney and asked whether he would like to make a statement. The defendant replied that he desired to remain silent. At this point, his father, who had been present in the District Attorney's office, asked for permission to talk to his son. This request was granted, and the two of them then had a conversation, after which the defendant's father indicated that his son wished to make a statement. The defendant was then asked whether he in fact desired to make a statement, and he replied in the affirmative. Thereupon he made a full confession to the crime for which he was charged. In upholding the lower court finding of voluntariness, the Court emphasized the fact that the defendant was amply advised of his rights and made a statement only after being able to consult with his father.

It is difficult to apply the recognized rules of law to the facts of this case. On the one hand, the record discloses prolonged interrogations of a highly impressionable young man. On the other hand, it is clear that this arrest was not his first encounter with law enforcement officers. He had ready access to family and friends, including a father with many years of police experience. It is not controverted that before each interrogation defendant was fully warned of his constitutional rights, including his right to counsel. In fact, this record discloses a notable absence of promises, threats, or other coercive forces which ordinarily render confessions involuntary.

Defendant's counsel emphasized the fact that the confession was rendered involuntary because defendant's father told him to sign

waivers of rights. It must be borne in mind that although the father, Forrest Thompson, was a police officer, he was not in this case a "person in authority" in the sense of having defendant in his control or custody. He was present as defendant's father and by courtesy of the Sheriff. Even in this capacity, the record does not show that he threatened defendant or held out any promise or hope which would overbear defendant's will. We think the fact that defendant had previously been involved with criminal activities indicates that this longtime police officer did not dominate his son. It is reasonably inferable that the father's acts were, in effect, admonitions to his son to tell the truth. Our Courts have consistently held that such admonitions, even by police officers holding an accused in custody, do not render confessions involuntary. State v. Pruitt, supra; State v. Thomas, 241 N.C. 337, 85 S.E.2d 300.

There was ample evidence to support the trial judge's findings, and those findings in turn support the trial judge's conclusions that the defendant freely, understandingly, voluntarily, and intelligently made a statement to Sheriff Yelton about 9:05 p.m. on 2 March 1974, without undue influence, coercion, or duress, and without any promise, threat, reward, or hope of reward; that he had been fully advised of his constitutional rights and understood his rights; that after being advised of his rights, he knowingly and intelligently waived his right to counsel at the time of interrogation and making of statement to Sheriff Yelton.

We hold that the trial judge correctly overruled the motion to suppress defendant's confession.

Defendant's contention that he was denied assistance of counsel is without merit. The record reveals that he was told on several occasions that he was entitled to counsel and that counsel would be appointed for him if he so desired. In addition, the Sheriff stated that counsel was not immediately appointed because members of defendant's family indicated that they would employ private counsel. Further, the arguments offered in support of this assignment of error

...ew necessarily considered and decided in the preceding assignment of error.

Defendant assigns as error the denial of his motions for judgment as of nonsuit. Defendant correctly contends that his conviction cannot be sustained upon a naked extrajudicial confession. However, it is equally well settled that if the State offers into evidence sufficient extrinsic corroborative circumstances as will, when taken in connection with an accused's confession, show that the crime was committed and that the accused was the perpetrator, the case should be submitted to the jury. State v. Jenerett, 281 N.C. 81, 187 S.E.2d 735; State v. Crawford, 280 N.C. 548, 133 S.E.2d 232; State v. Whittemore, 255 N.C. 583, 122 S.E.2d 306. Here, in addition to the confession, there was evidence which tended to establish, inter alia, that (1) on the night of the crime defendant had in his possession an automobile similar to the one belonging to deceased; (2) defendant had in his possession a large sum of cash on the same night; (3) defendant had opportunity to steal the pistol which was shown to have fired the fatal bullets; (4) on the same night defendant had in his possession a pistol described as being "the same color" as the one which fired the bullets into deceased's body; and (5) on the night of the crime he was with his girl friend, who saw him with empty shells in his possession.

We are of the opinion that there was ample extrinsic evidence, when taken with the confession and considered in the light most favorable to the State, to carry the case to the jury. This assignment of error is overruled.

Finally, defendant asserts that the trial judge erred by imposing the death sentence. The questions raised by this assignment of error were considered and found to be without merit in State v. Jarrette, supra. Accord: State v. Armstrong, 287 N.C. 60, 212 S.E.2d 864; State v. Vick, 287 N.C. 37, 213 S.E.2d 338; State v. Lowery, 286 N.C. 698, 213 S.E.2d 255; State v. Simmons, 286 N.C. 681, 213 S.E.2d 280; State v. Stegmann, 286 N.C. 638, 213 S.E.2d 282; State v. Woods,

306 N.C. 612, 313 S.E.2d 814; State v. McLaughlin, 306 N.C. 597, 313 S.E.2d 228; State v. Lamphins, 306 N.C. 607, 313 S.E.2d 106; State v. Avery, 306 N.C. 489, 312 S.E.2d 142; State v. Williams, 306 N.C. 429, 313 S.E.2d 113; State v. Sparks, 305 N.C. 691, 297 S.E.2d 712; State v. Honeycutt, 305 N.C. 174, 303 S.E.2d 844; State v. Dillard, 305 N.C. 73, 303 S.E.2d 6; State v. Noell, 304 N.C. 670, 302 S.E.2d 750.

Because of the imposition of the death sentence, we have carefully reviewed this entire record and find no prejudicial error in the trial of this case.

No error.

Supreme Court, U. S.
FILED
JAN 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1975

NO. 75-5983

****

CHARLES D. THOMPSON,
Petitioner

v.

THE STATE OF NORTH CAROLINA,
Respondent

****

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

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OPINION BELOW

From verdicts of guilty of first degree murder and kidnapping and judgments of death as to the murder charge and life imprisonment as to the kidnapping charge entered by the Superior Court (Trial Court) on the 1st day of June, 1974, defendant appealed to the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina affirming the judgment of the trial court is reported at 287 N. C. 303, 214 S. E. 2d 742 (1975).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U. S. C. §1257(3).

QUESTIONS PRESENTED

I.

WERE THE INCRIMINATING STATEMENTS MADE BY DEFENDANT WHILE IN CUSTODY BEFORE TRIAL FREE AND VOLUNTARY?

II.

WAS THE DEFENDANT DURING HIS IN-CUSTODY PRETRIAL INTERROGATION DENIED THE ASSISTANCE OF COUNSEL?

III.

IS THE DEATH PENALTY IMPOSED CRUEL AND UNUSUAL PUNISHMENT?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

AMENDMENT VII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On Monday, May 13, 1974, Petitioner was called to trial before the Superior Court of Rutherford County at Rutherfordton, North Carolina, on separate bills of indictment charging him with first degree murder and kidnapping. Following a jury verdict of guilty on both charges, Petitioner was sentenced to death on the murder charge and life imprisonment on the kidnapping charge.

Petitioner appealed his convictions and sentences directly to the Supreme Court of North Carolina where they were affirmed in an opinion and judgment on June 6, 1975.

STATEMENT OF FACTS

On Sunday, February 17, 1974, defendant Charles Thompson and P. G. Woods rode to work together at Fieldcrest Mills near Forest City, North Carolina, in Woods' car. Before going to work, Woods got some matches from the glove compartment of the car; at that time, about 11:00 P.M. there was a .22 caliber pistol in this compartment. The car was left locked. At 5:00 A.M. on Monday, February 18, 1974, Woods, at Thompson's request, gave Thompson the keys to his car. When Woods got off from work around 7:00 A.M. he noticed his car had been moved in the parking lot; however, Thompson was still in the car. They went home; Woods parked his car at his home but left it unlocked. About 3:00 P.M. that afternoon, Woods went out to his car to get some matches from the glove compartment; at this time, he noticed the pistol was gone. He immediately reported the gun had been stolen to the Forest City Police Department. The gun was loaded with six rounds of ammunition at the time it was reported missing.

On Monday, February 18, 1974, Mr. Van Gudger Watkins purchased a 1972 Chevrolet four-door hardtop car with 25,505 miles from his nephew, Terry Watkins.

On Tuesday, February 19, 1974, about 7:30 P.M., Charles Thompson was walking on Trade Street in the Town of Forest City, North Carolina, near a store called the Saddle Shop. At that time, Mr. Van Watkins drove up;

parked his car; reached into his pocket to get some keys; and upon doing so a roll of money fell out. At that point Charles Thompson decided to rob Watkins. Thompson followed Watkins into the shop; pulled a .22 caliber pistol; told Watkins to get in his car; told Watkins to drive to the end of a dead-end road at a cemetery at Doggett's Grove. Thompson proceeded to rob Watkins and then shot him five times as well as hitting him in the head with a piece of concrete.

Thompson drove Watkins' car to Shelby where he met Vanessa Whitworth at her house about 8:30 P.M. They drove to the Governor's Inn Motel to a room rented by Thompson. She observed the word "Impala" on the dashboard of the car as well as a jacket in the back seat. While at the motel, she saw a gun in a drawer in the motel room which she handed to Thompson; he put three empty shells from the gun into an ash tray in the room. Thompson had some money with him at the time. They left the motel about 10:40 P.M.; Thompson appeared neither nervous or excited.

About 10:30 P.M., February 19, 1974, the Rutherford County Sheriff's Department received a call from Watkins' family reporting that he was missing. The Sheriff's Department and the Forest City Police Department began searching the area for traces of Watkins.

During the day of Wednesday, February 20, 1974, around 11:15 A.M., Watkins' automobile was found by the Forest City Police Department at the Dunbar School area. The car, a 1972 Chevrolet Impala, had been partially burned; there was a torn owner's manual in the car as well as an orange jacket with trim around the sleeves and collar. Around 7:45 P.M. on that date, Watkins' body was found; it was photographed and later removed to the hospital morgue.

On February 21, 1974, an autopsy was performed on Watkins' body by Dr. J. Paul Hurt; this revealed four gunshot wounds in the body as well as compound skill fractures. The four bullets were removed and given to police officers.

On Monday, February 25, 1974, Charles Thompson hid the .22 caliber pistol in a tree off Jackson Street.

Charles Thompson was brought to the Rutherford County Sheriff's Department by his father, a former Deputy Sheriff who was then employed as a police officer with the Town of Spindale, at the request of the Sheriff on February 27, 1974, a Wednesday, about 4:00 P.M. His father was present along with one other officer; Thompson was advised of his rights and signed a written waiver at his father's insistence. Thompson was not charged with any crime at that time and he was not under arrest. This session lasted about an hour and twenty minutes, ending at 5:20 P.M.; it related to the report of P. G. Woods concerning his stolen pistol. Thompson was not released but kept in custody in a cell based on a telegram from the North Carolina Parole Board revoking his parole for a prior offense.

A second interview was held about eight and one-half hours later at 1:35 A.M. on Thursday, February 28, 1974, in the Sheriff's Office. His father was present part of that time. This session lasted until after 5:00 A.M.; a number of officers were present. At this time he was accused of the Watkins' murder but no warrant was issued.

A third interrogation took place around 1:55 P.M., February 28, 1974; he was advised of his rights; this session lasted to around 3:00 or 4:00 P.M.; a tape was made of the conversation which Thompson later signed.

A fourth interrogation was held at 7:50 P.M. on the evening of February 28, 1974. A written waiver of rights was obtained; no recording of the session was made and a number of law enforcement personnel were present. Thompson still had not been charged with the murder at this time. Thompson appeared nervous and sleepy.

A fifth session occurred on March 1, 1974, a Friday, at 2:43 P.M.; at this time, Thompson had been formally charged with the murder; again, a number of officers were present and no recording was made. This episode lasted about an hour and a half.

A sixth questioning took place on Saturday, March 2, 1974, at 0 P.M. This session was taped; the tape was placed in evidence at the trial; Thompson cried part of the time; he appeared remorseful and he confessed to the murder. That evening, about 8:00 P.M. Thompson spoke to his mother and father at the jail; he was crying, trembling and very upset.

Thompson said the Sheriff had threatened him with the death penalty if he did not tell the truth. His mother later testified that Thompson had a history of mental problems; that he had taken medicine for them at one time; that he had an I.Q. of 55; that he was very suggestable; and that he had completed only the ninth grade in school. This was confirmed by Dr. Robert Rollins. About 10:30 P.M. on the night of March 2, 1974, Thompson led officers to a tree where they found a pistol hidden which ballistic tests later confirmed was used to kill Watkins.

A lawyer was appointed to represent Thompson on March 6, 1974.

ARGUMENT

I.

THE PRETRIAL STATEMENTS MADE BY PETITIONER WHILE IN CUSTODY WERE FREE AND VOLUNTARY.

In the first question presented by the Petitioner, he asserts his confession was not voluntary because of the totality of the relevant circumstances which culminated in the confession which was ultimately introduced into evidence before the jury. He argues that even though he was advised of his constitutional rights before each interrogation session and his father was present at some of these sessions his free will was nevertheless overborne because of the extensive nature of the questioning; threats that were made and his personal characteristics.

In the area of pre-trial, in-custody confessions, the voluntariness of the confession is the critical factor. Even though the confession may be entirely reliable as shown by the other corroborating evidence, it is, nevertheless, inadmissible if involuntary. Rogers v. Richmond, 365 U. S. 534 (1961) There can be no doubt that the final confession by the Petitioner was reliable for there was considerable corroborating evidence in the record to substantuate almost every detail of the confession.

Reliability, however, is a part of the voluntariness test. As articulated by the decisions of this Court, this test is designed to bar admission of those confessions which:(1) are of doubtful reliability

because of the practices used to obtain them (for example, physical beatings, Brown v. Miss., 297 U. S. 278 (1936)); (2) are obtained by offensive police practices even if otherwise reliable (for example, trickery, Rogers v. Richmond, supra); or (3) are obtained under circumstances in which the defendant's free choice was significantly impaired (for example, by the use of drugs, Townsend v. Sain, 372 U. S. 293 (1963)).

In applying the voluntariness test, this Court has examined the totality of circumstances surrounding each confession. Haynes v. Washington , 373 U. S. 503 (1963). The factors deemed most important have been: (a) physical abuse, Lee V. Miss., 332 U. S. 742 (1948); (b) threats, Payne v. Arkansas, 356 U. S. 560 (1958); (c) extensive questioning, Turner v. Pennsylvania, 338 U. S. 62 (1949); (d) incommunicado detention, Davis v. North Carolina ,384 U. S. 737 (1966); (e) denial of right to consult with counsel, Fay v. Noia, 372 U. S. 391 (1963); and (f) the characteristics and status of the suspect, such as his lack of education, Culombe v. Connecticut , 367 U. S. 568 (1961), emotional instability, Spano v. New York, 360 U. S. 315 (1959), youth, Gallegos v. Colorado, 370 U. S. 49 (1962), or sickness, Jackson v. Denno, 378 U. S. 368 (1964).

Because it is undisputed that Petitioner was advised of his constitutional rights before each interrogation session, the recent case of Miranda v. Arizona, 384 U. S. 436 (1966), has no application; consequently, the voluntariness test, as set forth above, must be applied. From the record, it appears that the Petitioner was not subjected to physical abuse or incommunicado detention. There is some indication that the elements of threats, extensive questioning and the characteristics and status of the Petitioner are presented by the record. In question two, the element of denial of the right to consult counsel is presented separately by the Petitioner; accordingly, this aspect of the case will be considered there.

(a)

THREATS

There is no evidence in the record to indicate the police made threats of physical violence against the person of Petitioner or that they threatened any members of Petitioner's family. There is some evidence that one of the interrogating officers, Sheriff Blaine Yelton, told Petitioner that if he did not tell the truth he would recommend the death penalty. Sheriff Yelton denied he had ever made such a threat.

It also appears that Petitioner was confronted with his prior criminal record on at least one occasion by Sheriff Yelton although the exact context in which this confrontation took place is not clear. At the same time, the record discloses that Petitioner's father and mother were present during some of the sessions. These supportative influences, the respondent submits, were sufficient to overcome the coercive effect, if any, that references to the death penalty and his past criminal history might have had.

Payne v. Arkansas, supra, relied on by Petitioner is distinguishable on its facts. Payne's confession was induced because the chief of police threatened to turn him over to a mob of 30 to 40 people who would get him. It was this threat of mob action coupled with the incommunicado detention and lack of opportunity to have counsel or any members of this family present which tipped the scales. Moreover, the evidence of these threats was undisputed. In the case at bar, the evidence is disputed, members of the family were present and no mob was present.

(b)

EXTENSIVE QUESTIONING

The record indicates questioning began around 5:20 P.M. on February 27, 1974, and continued, off and on, until March 2, 1974, around 7:00 P.M. The Petitioner was in custody the entire four days with his father present part of the time and with both his father and mother present on March 2, 1974. The record indicates questioning sessions were held during the night as well as during the day. The record further indicates that Petitioner started out denying any involvement in the crime and then gradually changed his story until the confession of March 2, 1974, after a private session with his father and mother. It is unclear from the record how much sleep Petitioner had between sessions or how much he had to eat although it does appear he had a private call and that his aunt was employed as a cook at the jail where he was being held.

Turner v. Pennsylvania, supra, involved an interrogation session of four days exceeding a total of 23 hours; the suspect was not informed of his rights; he was not permitted to see friend or family and he was falsely told that other suspects had "opened up." Finally, the arrest was

not made until six months after the crime.

In the case at bar Petitioner was advised of his rights, his family was present, he was allowed periods of rest and only about 12 hours of actual interrogation took place in six or seven sessions over the four day period. He was arrested almost immediately after the crime. Although the questioning was extensive, the Respondent submits, under all of the facts and circumstances of the case, it did not amount to such coercion as to render the resulting confession involuntary.

(c)

CHARACTERISTICS AND STATUS

It is undisputed that Petitioner had a history of mental and emotional problems starting at age 13; that at one time he was under medication for this condition; that his I.Q. was 55; that he functioned at a fifth grade level although he went through the 9th grade in school; that he could function as an employee at a textile plant; that he could, with difficulty, pass a driver's license test; that he was easily influenced and intimidated; that he was 19 years of age; that he was black and that he had a criminal record. It also appears his father had been a former Deputy Sheriff but, at the time of the crime, he was employed by the Town of Spindale as a police officer.

It is this aspect of the case which is stressed most heavily in the petition to support the argument the confession was not voluntary. The Respondent argues that Petitioner's family were present during most, if not all, of the interrogation sessions. Moreover, it appears that Petitioner's father conducted his own investigation of the crime.

To deny that four days of intensive interrogation, even with family support, is not coercive is absurd. The Supreme Court of North Carolina, in its opinion, recognized this. This Court felt, however, that Petitioner had sufficient mental capacity to know what the effect of his confession was. It further felt that the supportative presence of his family was sufficient to prevent an outright lie by Petitioner. Little can be added to this view other than to point out that the resulting confession was reliable; i.e., Petitioner led the police to where he hid

the murder gun. Moreover, it appears that Petitioner admitted to his mother in a private talk that he did the killing because his victim threatened to identify him.

The case of Culombe v. Connecticut, supra, cited and relied on most heavily by Petitioner can be distinguished from the case at bar. For example, there was no physical evidence or other witnesses to corroborate Arthur Culombe's confession; his father or other family members were not present in an independent capacity; he was questioned for four nights and five days before he confessed; he was being interrogated about a whole series of crimes rather than one specific offense; he was never informed of his constitutional rights; he requested counsel which was denied; his wife and daughter were used by the police to induce the confession; the interrogation was designed to elicit a confession rather than develop information to check his story or develop other leads; he was given a "sham" hearing in a police court; and the police accused him of lying on numerous occasions. It was not merely his low mentality and illiteracy which produced the Court's conclusion the confession was involuntary, but rather, the combination of all these circumstances. In summary, Culombe presented a much more aggravated situation. The Respondent submits that Culombe should not control in this case.

II.

THE PETITIONER DURING HIS IN-CUSTODY PRETRIAL INTERROGATION WAS NOT DENIED THE ASSISTANCE OF COUNSEL.

The Petitioner argues he was denied the assistance of counsel during his pretrial questioning even though he repeatedly waived this right. The Petitioner does not contest the evidence which established beyond question that Petitioner did, in fact, waive his right to counsel and that this waiver was done both with and without consultation with his father. Appointed Counsel was waived because the family intended to employ private Counsel and because Petitioner's father was encouraging him to tell the truth.

The Respondent submits the record shows that Sheriff Yelton repeatedly advised both Petitioner and his father of all his constitutional rights including the right to have counsel present and counsel appointed in the event he could not afford to hire one. Appropriate waiver forms were signed by Petitioner before each interrogation session. The Respondent submits this is a far different situation than the one presented in Escobedo v. Illinois, 378 U. S. 478 (1964) and Crooker v. California, 357 U. S. 433 (1958) relied on by Petitioner in his Petition. Both cases involved circumstances where the defendant repeatedly requested the assistance of his retained counsel who was refused access to his client by the police and the police never warned him of his constitutional rights. See also Miranda v. Arizona, 384 U. S. 436 (1966).

Finally, in his Petition, the Petitioner acknowledges that all applicable North Carolina statutory and case law procedures were followed by the police during the course of the interrogation. Counsel was in fact appointed to represent the Petitioner, albeit after his confession.

In conclusion, there is nothing in the decisions to date which require the appointment of counsel at the pretrial stage when the defendant either plans to hire his own counsel or else desires to proceed without the advice of counsel. All that is required is for the police to tell the accused about his rights and give him an opportunity to exercise them, if he so desires. In the words of the old saw: they are required to provide the water and lead the horse thereto; they are not required to make the horse drink even if it would be to his best interest to do so.

Speculation that Petitioner and his father did not know what they were doing when they agreed to waive counsel during the interrogation session is fruitless. Courts cannot compel defendants to make wise choices; all that can be done is to assure an atmosphere where defendant is informed of his options and then given an opportunity to exercise them free of coercion. The Respondent submits this was done. If Petitioner's decision was unwise, it is now too late to "unring the bell."

III.

THE DEATH PENALTY

Although the Petitioner has not raised this point in his Petition, the Respondent submits the death penalty imposed in this case is constitutional. The position of the Respondent in this regard has been fully set forth in its brief in Fowler v. North Carolina currently pending in this Court. Accordingly, the Respondent directs the Court's attention to its brief in that case.

CONCLUSION

It cannot be denied this case presents a close and difficult factual situation. Involuntary, forced confessions which are unreliable or which are produced by unconsciencable police methods have no place in any criminal proceeding. Feelings of sympathy always flow to youths of minority races who have had a difficult time in life.

The Respondent submits that, on balance, there has not been a sufficient showing of such oppressive coercion to render the confession inadmissible. It is uncontroverted the confession was reliable; that Petitioner was advised of his constitutional rights; that he had the advice and support of his father and mother through most, if not all, of his ordeal and that he was no stranger to police methods. There is also no doubt the crime was brutal and senseless and that society cannot tolerate conduct of this type. The conviction should be allowed to stand.

Respectfully submitted, this the _____day of January, 1975.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served a copy of the Brief In Opposition to the Petition upon opposing counsel by depositing copies of the same in the United States Mail, postage prepaid, addressed to:

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